

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1435

COMMONWEALTH

vs.

ODIS CASSON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Odis Casson, appeals the denial of his second motion for new trial. We affirm.

Background. After a jury trial in 2012, the defendant was convicted of indecent assault and battery on a person age fourteen or over, G. L. c. 265, § 13H.¹ See Commonwealth v. Casson, 90 Mass. App. Ct. 1119 (2016) (Casson I). The Commonwealth alleged that the defendant touched the victim's breast with his hand; at trial, the defendant's position was that the victim's account of the touching was fabricated, but that he might accidentally have touched the breast.

In a consolidated appeal, the defendant challenged his conviction and the denial of his motion for a new trial (first

¹ The jury acquitted the defendant of four other charges.

motion).² In Casson I, his arguments on appeal included ineffective assistance of counsel based on his attorney's failure to request a jury instruction on the affirmative defense of accident; we affirmed the conviction. See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Addressing Casson's ineffective assistance claim in Casson I, we concluded that (1) the trial record was inadequate to show that trial counsel's failure to request the accident instruction was manifestly unreasonable, and (2) as the instructions that the trial judge gave, "combined with the defendant's version of events heard by the jury, made the accident instruction unnecessary," trial counsel's failure to request that instruction "did not deprive the defendant of any ground of defense."

In 2018, Casson filed a second motion for new trial (second motion), providing the motion judge (who was also the trial judge) with a second affidavit from his trial counsel (second affidavit). The second affidavit repeated counsel's account of her postverdict juror contact, and added counsel's statement that her failure to request an accident instruction was "an oversight . . . [and] not strategic." Casson's affidavit stated

² In Casson I, the first motion included an affidavit from trial counsel in which counsel stated "that two jurors had approached her to say that they thought the touching of the victim's breast was accidental." It appears, however, that counsel's affidavit was silent on the issue of why counsel did not request an accident instruction.

that counsel had told him about counsel's interaction with the jurors, and reiterated that any touching of the victim's breast was accidental. The judge denied the defendant's second motion on the grounds that the ineffective assistance claim raised had already been decided in Casson I, and alternatively, that the defendant had not been deprived of a substantial ground of defense by the lack of an instruction on accident. This appeal followed.

Discussion. The Commonwealth argues that Casson's ineffective assistance claim should be foreclosed by the doctrine of direct estoppel. "[W]here a defendant 'raises no new factual or legal issue' in a motion under Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), and simply seeks to relitigate a motion that was previously denied by the motion judge and rejected on direct appeal, 'principles of direct estoppel operate as a bar to the defendant's attempt in [the] rule 30 (b) motion to relitigate issues.'" Commonwealth v. Ellis, 475 Mass. 459, 475 (2016), quoting Commonwealth v. Rodriguez, 443 Mass. 707, 710-711 (2005).

Here, the defendant has provided new factual material, in the form of a new affidavit from trial counsel. This may go to one of this court's prior grounds for rejecting the defendant's ineffectiveness claim -- the inadequate record. It does not, however, provide any factual or legal basis for reconsidering

this court's second, independent ground for rejecting the claim -- that the absence of the instruction did not deprive the defendant of a substantial ground of defense. Accordingly, direct estoppel bars the defendant's claim.

Even if Casson were not estopped from consideration of his ineffective assistance claim, we perceive no error of law or abuse of discretion in the judge's denial of his motion for new trial. See Commonwealth v. Grace, 397 Mass. 303, 307 (1986). The parties have conceded that the issue of accident was fairly raised at the 2012 trial.³ Assuming, without deciding, that trial counsel's oversight in not requesting an accident instruction amounted to conduct falling below the standard of the average fallible lawyer, thus meeting the first prong of Saferian, the omission did not meet Saferian's second prong, because it did not deprive Casson of "an otherwise available, substantial ground of defence." Saferian, 366 Mass. at 96. We conclude here, as we did in Casson I, that considering the jury charge in its totality, and in the context of the evidence that the jury heard during the trial, the accident instruction was unnecessary.

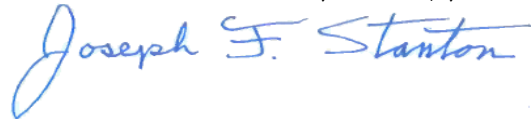
We reach the same conclusion here as we did in Casson I -- that "in these circumstances, the jury instructions on the

³ After review of the record, we agree that the issue was raised at trial.

Commonwealth's burden to prove the element of intent served the essential purpose of an accident instruction and thus trial counsel's failure to request such an instruction did not deprive the defendant of any ground of defense." Thus, the judge did not abuse his discretion in denying Casson's second motion for a new trial. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

Order denying motion for new
trial affirmed.

By the Court (Blake,
Ditkoff & Hand, JJ.⁴),



Clerk

Entered: October 30, 2019.

⁴ The panelists are listed in order of seniority.